Supreme Court, U.S.
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No. 96-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CMC HEARTLAND PARTNERS,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

Cases: **Page**

District of Columbia v. Sweeney,
310 U.S. 631 (1940) 3
Grady v. A.H. Robins Co.,
839 F.2d 198 (4th Cir.),
cert. dismissed, 487 U.S. 1260 (1988) 5
Hughes Tool Co. v. Trans World Airlines, Inc.,
409 U.S. 363 (1973) 7
In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.,
6 F.3d 1184 (7th Cir. 1993) 3
In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.,
974 F.2d 775 (7th Cir. 1992) 2
In re Edge,
60 B.R. 690 (Bankr. M.D. Tenn. 1985) 2
In re Frenville Co.,
744 F.2d 332 (3d Cir. 1984),
cert. denied, 469 U.S. 1160 (1985) 5
In re Penn Central Transp. Co.,
944 F.2d 164 (3d Cir. 1991),
cert. denied, 503 U.S. 906 (1992) 5
In re Piper Aircraft Corp.,
58 F.3d 1573 (11th Cir. 1995) 5
In re Radio-Keith-Orpheum Corp.,
106 F.2d 22 (2d Cir. 1939),
cert. denied, 308 U.S. 622 (1940) 2
In re THC Financial Corp.,
686 F.2d 799 (9th Cir. 1982) 5
In re Waterman S.S. Corp.,
141 B.R. 552 (Bankr. S.D.N.Y. 1992) 4
Sanks v. Georgia,
401 U.S. 144 (1971) 3

Schweitzer v. Consolidated Rail Corp.,
758 F.2d 936 (3d Cir.),
cert. denied, 474 U.S. 864 (1985) 2
Territory of Alaska v. American Can Co.,
358 U.S. 224 (1959) 3
Triangle Improvement Council v. Ritchie,
402 U.S. 497 (1971) 3
Urie v. Thompson,
337 U.S. 163 (1949) 7
Virginia Military Institute v. United States,
508 U.S. 946 (1993) 7

Statutes:

11 U.S.C. § 101(4)(A) 2
11 U.S.C. § 101(4)(B) 2
11 U.S.C. § 205(b) (repealed 1978) 2

Other:

5 Collier on Bankruptcy § 77.20 (14th ed. 1978) 2

The question in this case is whether a State can frustrate the federal bankruptcy laws by creating, after a federal bankruptcy discharge, a new cause of action that imposes liability based on conduct that took place before the discharge. The bankruptcy discharge in this case occurred more than a decade ago. Petitioner CMC Heartland Partners, the successor-in-interest to the bankrupt Milwaukee Road, has since established itself in the business of real estate management and development. Nonetheless, respondent Union Pacific insists that CMC is now subject to potentially enormous liability for conduct that occurred years *before* the discharge under a state statute that was not enacted until years *after* the discharge. The Seventh Circuit agreed.

The implications of that decision are stunning. It threatens to subject the twin foundations of the federal bankruptcy laws—the need for a comprehensive and equitable settlement of debts and a "fresh start" for the debtor—to the vagaries of state law. A federal bankruptcy discharge would be wholly meaningless if States remained free to impose liability for known pre-discharge conduct by simply creating a new legal cause of action. The decision below thus poses a fundamental threat to the efficiency and integrity of the federal bankruptcy process.

Union Pacific, however, argues that the decision below is of little practical moment for three reasons: (1) it was decided under § 77 of the Bankruptcy Act of 1898, which allegedly has a "far different" definition of "claim" than the 1978 Bankruptcy Code, Opp. Br. at 5-7, (2) the particular plan of reorganization in this case "specifically allows" the post-discharge claims at issue here, *id.* at 7-8, and (3) this case does not implicate the circuit split identified in the petition, *id.* at 8-9. In addition, Union Pacific argues that the question presented in the petition was not raised below. *Id.* at 9-13. None of these arguments can withstand even casual scrutiny.

1. Union Pacific first argues that the definition of "claim" under § 77 of the 1898 Act is "narro[w]," and thus "far different" from the "broad" definition in the 1978 Code. Opp. Br. at 5, 7. That is simply untrue. As the court below recognized, the definition of "claim" in § 77 of the 1898 Act is "broad," and in all material respects identical to the definition in the 1978 Code. *See* App. at 30a; *see also In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 781 (7th Cir. 1992) ("Just as Section 77 of the 1898 Act broadly defines claims, the new Bankruptcy Code also broadly defines claims. Compare 11 U.S.C. § 205(b) (repealed 1978) and 11 U.S.C. § 101(4)(A) and (B) (enacted 1978).").

Union Pacific's argument to the contrary is misleading at best. Union Pacific emphasizes that "generally" the 1898 Act provides only for the discharge of "provable" claims. Opp. Br. at 6 (citing *In re Edge*, 60 B.R. 690, 694 (Bankr. M.D. Tenn. 1985)). That observation is correct but irrelevant. This case arises under § 77 of the 1898 Act, which specifically provides that a "claim" need *not* be "provable" and may be contingent. *See, e.g.*, 5 Collier on Bankruptcy § 77.20 at 602-03 & n.8 (14th ed. 1978); *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22, 26-27 (2d Cir. 1939), *cert. denied*, 308 U.S. 622 (1940); *cf. Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942-43 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).[1] It is hardly surprising, then, that Union Pacific provides no citation for its remarkable assertion that "the Section 77 definition is *far more limited* than the definition of claim under the Bankruptcy Code." Opp. Br. at 6 (emphasis added). The court below in no way purported to draw any such distinction between the 1898

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[1] The definition of "claims" under § 77(b) includes "debts, whether liquidated or unliquidated . . . or other interests of whatever character." 11 U.S.C. § 205(b) (repealed 1978). The definition of "creditors" under that section, in turn, includes "all holders of claims of whatever character against the debtor or its property, *whether or not such claims would otherwise constitute provable claims under this title.*" *Id.* (emphasis added).

and 1978 statutes; to the contrary, it highlighted their virtually identical definition of "claim," *see* App. at 21a-22a, 30a, and relied indiscriminately on cases decided under both. There is no reason to suppose, thus, that the decision below can or will be limited to the 1898 Act. If the broad definition of "claim" under the 1898 Act does not prevent a State from creating new post-discharge liabilities based upon known pre-discharge conduct, neither does the equally broad definition of "claim" under the 1978 Code.

Even if the decision below could be limited to the 1898 Act, moreover, it would still have enormous practical significance. Because the 1978 Code does not apply retroactively, the 1898 Act continues to govern any dispute (like this one) that involves a bankruptcy filed before October 1, 1979. *See, e.g., In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1186 n.1 (7th Cir. 1993). The decision below thus has the effect of opening the door for States to impose new obligations on a successor of any entity that filed for bankruptcy over the eight decades between 1898 and 1979. The impact will be felt not just by the railroad industry, but by a substantial portion of American industry across the board.

As a practical matter, thus, the decision below not only has far-reaching implications for bankruptcies filed under the 1978 Code, but also brings the 1898 Act back to life. This case is quite unlike the ordinary case in which a statute's repeal deprives it of practical effect. *See, e.g., Sanks v. Georgia*, 401 U.S. 144, 147-53 (1971); *District of Columbia v. Sweeney*, 310 U.S. 631 (1940); *cf. Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 498-99 (1971) (Harlan, J., concurring in dismissal of *certiorari*). Where, as here, a repealed statute continues to have important practical effects, this Court has not hesitated to grant review. *See, e.g., Territory of Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959).

2. Union Pacific next argues that, regardless of the underlying law, the Reorganization Plan in this case

"specifically allows for the post-discharge assertion of claims based on *causes of action* arising after the bar dates." Opp. Br. at 7 (emphasis added). That argument can most charitably be characterized as counter-intuitive.

The Reorganization Plan in this case specifically provides for the post-discharge assertion of contribution or indemnity claims only when "based on *facts* that are unknown, undisclosed and unasserted" as of the bar date. App. at 24a (quoting Plan of Reorganization § 11.2) (emphasis added). The Plan thus reflects the settled law that "a claim arises at the moment when *acts giving rise to the alleged liability* are performed." *In re Waterman S.S. Corp.*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992) (emphasis added). What matters, in other words, is the underlying conduct, not the legal label attached thereto.

Union Pacific remarkably tries to turn the Plan to its advantage by equating a "fact" with a "cause of action." *See* Opp. Br. at 7-8. Thus, Union Pacific argues that the Plan in this case allows "the assertion of claims against the successor corporation even when the *cause of action* arose after the bar dates, but the relevant *conduct* occurred before the bar dates." Opp. Br. at 7 (emphasis added). The creation of a new cause of action after a bankruptcy discharge, however, is a development of *law*, not of *fact*. The *facts* underlying Union Pacific's current claims—the environmental contamination at the Tacoma railyard—were anything but "unknown, undisclosed and unasserted" at the time of the discharge. *See* App. at 30a-33a. The Plan in no way purports to authorize claims based on a post-discharge *legal* development.

Indeed, Union Pacific's argument is particularly unpersuasive under the facts of this case, where the "new" state-law cause of action (the MTCA) mirrors a pre-existing federal cause of action (CERCLA) that is concededly barred. The decision below simply provides a roadmap for state law to revive a claim barred after a federal bankruptcy discharge by

enacting a copycat statute and applying it retroactively to pre-discharge conduct. That result is senseless and unfair.[2]

3. Union Pacific third argues that this case does not implicate the circuit split identified in the petition because it is limited to "the issue of when a claim *based on a statute adopted after the bar dates arises*." Opp. Br. at 8. *See also id.* at i. On this narrow issue, Union Pacific asserts, there is no circuit conflict. *See id.* at 8-9 (citing *In re Penn Central Transp. Co.*, 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992)).

Union Pacific's asserted limitation is wholly artificial. The lower courts are divided on the question whether, as a matter of federal bankruptcy law, a "claim" arises at the time when the conduct underlying the claim occurs, or at the time when a cause of action based on that conduct arises under state law. *Compare In re Piper Aircraft Corp.*, 58 F.3d 1573, 1576 & n.2 (11th Cir. 1995), *and Grady v. A.H. Robins Co.*, 839 F.2d 198, 201-02 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988), *with In re Frenville Co.*, 744 F.2d 332, 335-36 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). It is immaterial *why*, in any particular case, a cause of action arises after the underlying conduct on which it is based.[3] Union Pacific's attempt to

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[2] It is worth noting that Union Pacific's current claims are based entirely on the contribution right created by the MTCA long after the discharge, *not* the indemnification right contained in the contract of sale. Union Pacific lost its contractual indemnification right (like its CERCLA contribution right) by failing to file any contingent claim during the Milwaukee Road bankruptcy proceedings. *See, e.g., In re THC Financial Corp.*, 686 F.2d 799, 802-04 (9th Cir. 1982).

[3] In some cases (like this one) the cause of action arises after the underlying conduct by virtue of a newly-enacted statute. In other cases, the cause of action arises after the underlying conduct because that conduct does not immediately result in actionable injury. *See, e.g., Piper*, 58 F.3d at 1576 & n.2; *Grady*, 839 F.2d at 201-02. There is no relevant difference between these two situations.

distinguish the acknowledged circuit split by artificially narrowing the question presented in this case is nothing but semantic sleight-of-hand.

4. Finally, and most desperately, Union Pacific attempts to avoid review by asserting that "the question presented by the petitioner was not pressed or passed on in the courts below." Opp. Br. at 9. That is not true.

To the contrary, CMC consistently argued below that Union Pacific's current claim for contribution under the MTCA (like its claim for contribution under CERCLA) should be barred because Union Pacific knew about the underlying contamination at the Tacoma railyard but failed to file any contingent claims during the Milwaukee Road bankruptcy proceeding. Thus, in the first round of litigation before the Seventh Circuit, CMC argued that "[t]he district court erred . . . in concluding that even though the *same facts* form the basis for Union Pacific's MTCA [and CERCLA] claims, Union Pacific could not have constructive knowledge of those claims because MTCA was not enacted until 1989." Brief of Appellant CMC Heartland Partners, Nos. 92-3713 and 92-3790 (12/21/92), at 18 (emphasis added). *See also* Responsive Brief/ Reply Brief of Appellant/Cross Appellee CMC Heartland Partners, Nos. 92-3713 and 92-3790 (2/19/93), at 22 ("The test . . . is not whether a claim for contribution has fully accrued (under whichever statute it is deemed to arise), but whether the claimant had knowledge of a known release of a hazardous substance, knowledge of likely response costs under the applicable statutes, and knowledge that the hazardous spill resulted from the activities of the debtor.").

The Seventh Circuit resolved the first round of litigation below by holding that Union Pacific's MTCA claim would be barred if similar liability existed under other Washington statutes prior to the discharge. *See* App. at 33a-34a. That holding set the agenda for the remand; it is no surprise that the second round of litigation focused on the question of "what

liabilities under the [MTCA] existed [at the time of discharge] by virtue of Washington state statutes then in effect." *Id.* at 34a. But that does not mean that CMC is now precluded from seeking review of the broader issues that it raised in the first round of litigation. To the contrary, it is well-settled that a party is entitled to raise in a petition for *certiorari* all issues presented in earlier stages of the litigation. *See, e.g., Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *cf. Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of *certiorari*).

CONCLUSION

For the reasons stated in the petition for writ of *certiorari* and herein, the petition should be granted.

Respectfully submitted,

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